7-1992

The Formal Character of Law

Robert S. Summers
Cornell Law School, rss25@cornell.edu

Cambridge Law Journal, 51(2), July 1992, pp. 242–262
Printed in Great Britain

THE FORMAL CHARACTER OF LAW

ROBERT S. SUMMERS*

I. INTRODUCTION

I feel honoured to be your guest here, and am pleased to have this opportunity to lecture on my academic passion—"The Formal Character of Law".[1] Law has several fundamental characteristics. My main thesis is that formality is one of these. I define a "formal" feature of law as one that is in some way independent of the substantive content of the law. For example, the definitiveness of a legal rule is a formal feature of the rule's configuration, and is independent of the substantive content of the rule. Formal configuration is one thing, and substantive content another. But as we will see, there are different ways in which a formal feature may be independent of substantive content, and there are still other, related, senses of formal.

The topic I am addressing would have appealed to your benefactor and my fellow American, the late Professor Arthur Goodhart. His writings reflected a respect for legal formality, and this set him apart from most American jurists of his time, a distinction that may not be difficult to explain. After all, Professor Goodhart was educated in the law in this university. Here, he was very likely *not* encouraged to believe that law could be "all substance and no form", or that legal form is only a kind of receptacle for substantive policy, or that form can never properly co-determine the law's content, or that desiderata of form in law ultimately reduce simply to *elegantia juris*, or that legal formality is without any rational backing and so inherently formalistic, or that legal formality is confined to certain requirements for valid contracts and wills.[2]

* Arthur L. Goodhart Visiting Professor of Legal Science, University of Cambridge 1991–92; William G. McRoberts Professor of Research in the Administration of Law, Cornell University. This article is a revised version of the text of the Goodhart Lecture delivered in the University of Cambridge on 4 December, 1991. The author is indebted for discussion to Patrick Atiyah, Geoffrey Marshall and Peter Drahos. The author also wishes to thank Mrs. Carol Dowling for assistance on the manuscript.

[1] See generally, P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford 1987); Summers, "Theory, Formality and Practical Legal Criticism" (1990) 106 L.Q.R. 407; Summers, "Judge Richard Posner's Jurisprudence" (1991) 89 *Michigan Law Review* 1302; "Statutes and Contracts as Founts of Formal Reasoning" in P. Cane and J. Stapelton, eds., *Essays for Patrick Atiyah* (Oxford 1991). I am currently working on a book on the formal character of law.

[2] This is not meant to be a complete inventory of common fallacies about legal formality.

I think it is certainly true that English lawyers and legal academics have understood and honoured the formal features of law more fully than their American counterparts. Nevertheless, I believe for two reasons that my thesis is pertinent on this side of the Atlantic as well. First, there are signs over the past two decades that overall levels of legal formality in the English system may be in decline. I will cite a few examples. England has been adopting more and more rules that are relatively open-ended and thus formally not very definitive. Most of these consist of broad grants of discretion in public law,[3] but there are private law examples as well. For instance, you have acquired a wide-ranging statute in my favourite common law subject of contract that says certain exemption clauses are invalid unless they "satisfy the requirement of reasonableness".[4] In your statutes of limitation you now have a broad equitable exception.[5] It is my understanding that the already surprisingly low level of formality in your rules of court jurisdiction continues downward still.[6] Formality seems to have experienced a kind of decline and fall in your field of private international law, as well.[7] It may not be too much to say that your courts recently created retrospectively a new criminal offence—marital rape.[8] Though this reform is justified on the merits, judicial change here is a less formal mode of reform than legislation. Judicial change also lowers, at point of application, the formal mandatoriness of law generally.[9] Though I have no intent to enter your debate over membership of the European Community, I do think this membership puts the formality of English law at risk in various ways. For one thing, EC membership introduces an entirely new, and substantive, ground on which the European Court of Justice may, in effect, declare Acts of Parliament invalid. The European Court also takes a teleological approach to statutory interpretation at variance with the more formal English approach in which informed arguments from ordinary or technical meaning have primacy.[10] It will be interesting to see how far English courts ultimately choose to follow in matters solely within their own jurisdiction. The examples I have just cited are all ones I have gathered at random. Yet they indicate that legal formality and its virtues may no longer be honoured or understood quite as before, even in England.

[3] P.S. Atiyah, "From Principles to Pragmatism" (1980) 65 *Iowa Law Review* 1249.
[4] Unfair Contract Terms Act 1977.
[5] The Limitation Act 1980, s. 22.
[6] See, for example, *Spilada Maritime Corp.* v. *Cansulex Ltd.* [1986] 3 All E.R. 843.
[7] R. Fentiman, "Domicile Revisited" [1991] C.L.J. 445. The author is indebted to Mr. Fentiman for assistance with some of the examples here.
[8] *Regina* v. *R.* [1991] *The Times Law Reports* 468.
[9] On mandatory formality, see the text, *infra*, at II.D.
[10] J. Bridges, "National Legal Tradition and Community Law: Legislative Drafting and Judicial Interpretation in England and the European Community" (1981) 19 *J. Common Market Studies* 351.

Let me hasten to say that legal formality, as I conceive it, is not hostile to change. Nor am I! But I am sure you agree (*pace* Marx) that before we change an existing formal feature of law, we should first try to understand it, and see what may lie behind it. Yet it cannot be said that in my own country we have always done this. In this century we over-reacted to the excessive formality of our late nineteenth-century law. American academics and practitioners came almost instinctively to condemn nearly everthing wrong with law and legal reasoning as "formalistic" (a practice that continues today in many quarters). In fact, Americans frequently threw the baby—formality, out with the bath water—excessive formality. Why did we do this? There are doubtless many explanations. We lacked the concepts required to understand legal formality adequately, and because of this, could not grasp the full force of its normative claims. We had no way to analyse where the law was in terms of formality, and had no way to argue articulately where it ought to be in these terms. Today, whole branches of American law are still "substantivistically" awash in a sea of policy. In private law, the subject known as the conflict of laws is the premier example,[11] but the law of products liability is a close second.[12] I do not say England is doomed to a similar fate. I merely suggest a more limited possibility for your system, and cite some examples of creeping substantivism in your own garden.

I turn to the second reason why I believe my thesis might be worthy of your attention. We do not yet have anything like a frontal and systematic treatment of legal formality in Anglo-American legal literature.[13] Two of the best-known jurists of our time, Lon L. Fuller and H.L.A. Hart, did not so treat this subject. Hart's own successor is largely concerned with what the substantive content of a system of law ought to be, from the standpoint of political, economic, moral and social theory. Most American jurists and law professors are today preoccupied with law's policy content. This includes substantivists of the right such as Judge Richard Posner and his School, and substantivists of the left such as Professor Duncan Kennedy and his School. (Some American theorists even collapse the distinction between the formal and the formalistic, and condemn anything formal in law as *ipso facto* bad, a position that is incoherent.)

In 1987, Professor Patrick S. Atiyah of Oxford and I published a book comparing the levels of formality in the English and American

[11] See Atiyah and Summers, *supra* note 1, at pp. 67–68.

[12] See the admirable essay by a former holder of the Goodhart Chair: J. Fleming, *The American Tort Process* (Oxford 1988).

[13] Some German theorists, however, have taken an interest in the systematic study of legal formality broadly conceived. See, for example, K. Engisch, "Form und Stoff in der Jurisprudenz", *Beiträge zur Rechtstheorie*, (1984), p. 251.

systems.[14] In that work, we concentrated on the differing status in the two systems of legally authoritative, *i.e.*, formal, and merely substantive reasons, in the creation and application of law. But in our book we did not address the formal character of law itself in a frontal and systematic way. This year, the Goodhart Professorship is providing me with a welcome opportunity to pursue the vast, complex, and absorbing subject of legal formality in a more sustained way. It is therefore especially fitting that I should share here the essentials of what might eventually prove to be of general interest in my work. Inevitably, some of what I will have to say is programmatic.

At the outset I must stress that I will not report the results of any legal research nor will I reveal any discoveries of fact about legal phenomena. This is not the nature of my subject. Rather, I will assemble reminders of facts that we already largely take for granted. I will re-order, reconceptualise, and introduce a nomenclature for much that is already very familiar. This will sharpen our perception of formal features in diverse legal phenomena. And by using a uniform nomenclature for these formal features, I will call attention to essential similarities.

II. Formality in Basic Types of Legal Phenomena

It is my thesis, then, that all major types of legal phenomena are formal in some significant way or ways. I will now demonstrate what is formal about several of these types of phenomena. I will also indicate how such formality is pervasive and indispensable, and will identify rationales special to formality which can justify even high levels of it.

A more or less comprehensive inventory of the basic types of legal phenomena to be found in an Anglo-American legal system would include the following:

- the foundational rules and other legal precepts in each field of substantive and procedural law;
- accepted criteria for identifying state-made law as valid, and also such criteria for private transactional law;
- an accepted general methodology for adherence to common law precedent;
- an accepted general methodology for interpreting statutes (and accepted methodologies for interpreting other written law);
- a legislature and legislative procedures;
- a court system and court procedures (with provision for judicial independence);

[14] See Atiyah and Summers, *supra* note 1.

- administrative bodies and administrative procedures;
- fundamental "jurisdictional" law separating, allocating and limiting legislative, judicial, and administrative powers, including powers to reform law;
- received methods for differentiating questions of fact from questions of law, a law of evidence, and a general theory of legal truth for civil cases, with a separate such theory for criminal cases;
- law defining the state and other legal entities, defining official offices, and defining legal personality generally, including corporate personality;
- modes of organising legal resources into basic techniques of legal implementation: penal, grievance-remedial, administrative-regulatory public-benefit conferring, and private arranging;
- sanctions and related enforcement and implementing devices, including restrictions on self help;
- devices for securing continuity and for bringing about change in all aspects of the system; and
- some special mode of protection for basic individual rights.

A. Formal Features of Rules and Other Legal Precepts

First, I will consider the formality of rules and other legal precepts—what I call "preceptual formality". In the case of rules, one can identify such formal attributes as the degree of completeness of the rule, the degree to which it is definitive, the degree of its generality, the presence of any justified fiat, and the extent of formality of expression which includes, for example, whether the law is written, how far it draws on a specialised vocabulary, and so on. Each of these formal attributes pertains to the structure, or configuration, or shape, or manner of formulation of the rule, in contrast to its substantive content as such. Each attribute is thus in this sense formal, and each is complex in ways I cannot go into here.

The formal attributes of rules and other precepts manifest themselves in complementary substantive content. For example, the definitiveness of a rule, though formal, manifests itself in complementary substantive content of the rule.[15] Yet this very same complementary content can also be identified, analysed, and evaluated independently as substantive content. Thus the same substantive content might in separate ways be deficient in form, *e.g.*, lack

[15] But no single formal attribute can have complementary content that exhausts the entire material content of a rule. Nor do the complementary contents of all formal attributes taken together specify the whole material content of the rule. As I suggest later, first-level policy informs most such content. I am indebted here to Christian Mammen.

sufficient definitiveness, *and* be morally objectionable and thus also deficient in substantive content. We might imagine a health care regulation providing that: "All especially useful people shall be entitled to advance to the head of the eligibility queue for kidney dialysis".[16]

Formal attributes commonly serve what I will call the first-level policy goals of rules and other precepts. For example, that well-known statute, "No vehicles in the park", is complete, definitive, general, and formally expressed. We can also readily see how these formal attributes, as manifest in complementary content, serve first-level policy goals of park quiet and safety. In so doing, these formal attributes also leave their own distinctive imprint on the overall substantive content of the statute. To grasp this, we need only to compare a different statute which lacks these attributes in significant measure, yet is addressed to the same basic problem. Consider, for example: "The park superintendent may exclude objects as he sees fit". The overall formality of this statute is much lower than the "no vehicles" version, and not surprisingly, its substantive content is very different.

Indeed, the higher the formality required to serve first-level policy goals, the clearer its imprint on substantive content. In fact, some first-level policy goals cannot be appropriately served without high formality. For example, highly complete, definitive, and general rules laid down in advance may be essential to guide private behaviour in the ways required to resolve "co-ordination" problems satisfactorily, as where a law-making body requires in advance that all park joggers jog on the left on park pathways, as contrasted merely with requiring them to "jog reasonably", with the rights of the parties sorted out after the fact when collisions occur. Here the imprint of form on substantive content is plain, and is driven by first-level policy.

But formality in law is justified not merely as a means to first-level ends such as park quiet and safety. One way to see this is to imagine two statutes that might more or less equally serve first-level policy goals, yet one statute is more formal, and therefore preferable in light of what I will call second-level rationales behind formality. Thus, legislators might well prefer to adopt a statute that says "no vehicles in the park" instead of a statute that says: "the park superintendent may exclude objects as he sees fit". After all, the "no vehicles" statute is more complete, and more definitive, and exhibits higher expressional formality. Formal attributes are desiderata in legal ordering in their own right, and not merely insofar as they serve

[16] Of course, the same substantive content could be good in form and good in substantive content, or good in form and bad in substantive content, or even bad in form yet (within limits) good in content.

first-level policy goals. This is because formal attributes generally serve second-level rationales *for legal formality*. These rationales vary somewhat in nature and force with the type of formality involved. The second-level rationales behind the formal attributes of rules include: facilitation of citizen planning and self-direction, ease of official administration, minimisation of disputes, facilitation of dispute settlement, and uniformity and equality before the law. We can readily see, for example, how the more formal "no vehicles" statute would serve each of these rationales better than the open-ended "as the superintendent sees fit" statute.[17]

The formal attributes of rules and other precepts may also serve second-level rationales that implicate basic public law values. For example, a proposed law that is half-made and ill defined is hard to vote on, whereas a complete and well-defined law can be more readily evaluated and acted on. Thus, the level of formality may implicate nothing less than the rational quality of legislative deliberation and judgment. This, in turn, affects the legitimacy of the outcome.

The "second-level" rationales for legal formality exert justificatory force of their own, and these rationales are frequently not fully congruent with first-level policy. They may even conflict with first-level policy, and win out to some extent. For example, the legislature or a court may opt for a rule that is over- and under-inclusive in relation to first-level policy aims, given the gains this brings by way of serving second-level rationales. Thus, on plausible interpretations, the "no vehicles" statute would over-include as to battery-driven wheelchairs that do not interfere with quiet and safety, and it would under-include as to skateboards which do interfere. Yet despite this lack of fit with first-level policy, legislators at inception might still reasonably prefer the "no vehicles" version to a more open-ended alternative, *i.e.*, "as the park superintendent sees fit". After all, the second-level rationales for formality favour this more complete, more definitive, more general, and more formally expressed version. As I have suggested, these rationales include enhanced citizen self-direction, enhanced ease of official administration, greater minimisation of disputes with attendant social harmony, and increased equality before the law. When this kind of trade-off occurs in legal ordering, as it frequently does, form leaves an especially dramatic and distinctive imprint on substantive content.

In sum, the formal attributes of rules and other precepts can be straightforwardly identified, their formality intelligibly defined, their significance independent of substantive content duly demonstrated,

[17] Just how the varieties of formality serve or fulfil such rationales could be the subject of an extended essay in itself.

their own distinctive justificatory backing in terms of second-level rationales readily accounted for, and their potential for even dramatic imprint on content clearly explained. Moreover, in rules, we find most attributes of preceptual formality present to some degree. This is not merely pragmatically justified, but is to some extent a necessity.[18] Further, rules are themselves indispensable to law as we know it. These points are of special importance for my overall thesis. Given that all basic types of legal phenomena themselves exist and fulfil their functions partly by virtue of rules, it follows that all basic types of legal phenomena necessarily exhibit some degree of formality.

The formality of rules and other legal precepts, *i.e.*, preceptual formality, is of significance in positive legal ordering in still other ways I have not yet frontally addressed. I will first elaborate on the role of formal attributes in the kind of responsible thinking that should occur when lawmakers create or modify rules. Lawmakers cannot meaningfully consider and evaluate proposed legal solutions to problems without concretely "trying on" various possible fusions of form and substance. Let us imagine that someone proposes a substantive policy to the effect that "traffic safety is desirable". This can at most be only a point of departure.[19] It is obvious that we will not have anything meaningful to analyse unless we address further considerations of first-level policy such as what other policies may be implicated, what resources we would have to expend, and who must pay. But of more relevance to the significance of my overall thesis, we must go beyond first-level policy altogether and consider desiderata of form and the bearing of their second-level rationales. For instance, how complete should the rule be and why? How definitive should the rule be and why? How general and why? How formally should it be expressed, and why? In responsible thought about any significant problem of legal ordering, we must usually formulate and compare more or less fully formed alternative rules. Relevant first-level policies only *preliminarily* indicate the ultimate substantive content of these rules. The introduction and refinement of desired formal attributes such as completeness, definitiveness, and generality, with their complementary substance, affect this content. In this process, content dictated by desiderata of form as backed by second-level rationales, and content dictated by desiderata of first-level policy will merge in different ways into the overall content of

[18] This topic, too, calls for a separate essay.

[19] See generally Summers, "Some Considerations Which May Lead Lawmakers to Modify a Policy When Adopting It As Law" (1985) 141 *Zeitschrift für die Gesamte Staatswissenschaft* 41. For Fuller's views on this theme, see the summary and references in Summers, "Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law" (1978) 92 *Harvard Law Review* 433, 437–39. I am also indebted here to John Mansfield and John Moscati.

each alternative rule. Any simple "pre-legal" policy such as "traffic safety is desirable" will disappear, and we will confront alternatives truly worth thinking about, namely rules in which form and substance are differently fused. In such a process of responsible thought, we can see concretely how the introduction of varying formal attributes each with its complementary substance can alter the content of a rule. Contrary to what is often assumed, the draftsman who drafts and redrafts does not merely refine first-level policy. He also fuses first level policy with specific attributes of form and their complementary substance, in light of the bearing of second-level rationales.[20]

As I have indicated, the presence of formal attributes is generally a matter of degree. Thus, for example, we may have high definitiveness or high generality, or low definitiveness or low generality, with, in turn, their complementary substance manifest in the content of a rule or other precept. As we have seen, a higher level of formality may, in some circumstances, not only serve second-level rationales, but also make the rule a more suitable and effective instrument of first-level policy as such. A great many private law examples demonstrate as much. For example, in my own subject of commercial law, bills of exchange could not have come to serve as effective substitutes for money without the very high formality of the legal rules defining them and facilitating their use. Some of the greatest of our legal achievements in public affairs are also monuments to high formality. Thus, today we have highly formal rules governing how a new government may be elected to succeed the government of the day. We also have highly formal rules that yield billions in tax revenues, and function relatively smoothly—the poll tax aside! Without such highly formal rules governing essential details, Western democracies simply could not exist, and, which may be the same thing, could not finance themselves. Such examples of great legal success merit closer study from the point of view of formality. In them, the formal attributes of rules largely dovetail with and serve first-level policy, as well as fulfil to a high degree various distinct second-level rationales. But even when higher formality would not implement first-level policy better, indeed, even when higher formality comes at the price of somewhat less by way of realisation of first-level policy goals, we have seen that the lawmaker may still

[20] We may differentiate two situations. In the first, legal policy is being fed into an existing rule or set of rules in which we already have a degree of completeness, a level of definitiveness, a level of generality, perhaps a kind of fiat, and an established mode of expression including, possibly, even a highly specialised and precise technical vocabulary. In the second type of situation, we start more or less from scratch, and the norms and constraints of formality are not so dramatic, yet if given their due may exert strong influence on content, as in the "no vehicles" example in the text.

think this price worth paying because of the second-level rationales that higher formality serves.[21]

Of course, it might transpire that the level of any attribute of preceptual formality, *e.g.*, definitiveness, or generality, is too high. In a park *specifically designed* primarily as a place of rest for the elderly and for the infirm, a statute that says "no vehicles in the park" would preclude battery-driven wheel chairs and thus could be quite seriously over-general in relation to first-level aims. It would thus be a prime candidate for legislative revision. Similarly, the level of preceptual formality of a case law doctrine could be too high. For example, a defence such as last clear chance in negligence law could turn out to be too definitive—too categorical in relation to first-level aims, and call for revision.[22] In such examples, the fact that second-level rationales may be served is not sufficient to justify the corresponding sacrifice of first-level policy. Indeed, it may be that excessive regard for these rationales accounts for some over-formality, *i.e.*, some of the "formalistic", in law.

By the same token the level of a formal attribute may be too low. A precept may not be sufficiently definitive, or not sufficiently general, for example, and thus may fail to accord sufficient force to the bearing of applicable second-level rationales. Numerous examples from my own system could be cited in which legal ordering has floundered or is floundering because of under-formality. (Perhaps we need "substantivistic" in our scheme of possible criticisms, if not also in our lexicon.)

I cannot consider here the formality of other basic legal phenomena in the relatively detailed way that I have considered rules. It will suffice for my purposes if I discuss only in suggestive terms the formality of several other basic types.

B. The Formality of Source-oriented Criteria of Legal Validity

I turn now to a second type of basic legal phenomenon, a type very different from rules and other legal precepts, namely, the accepted criteria within a legal system for determining whether putative rules or other precepts are valid as law. In all modern systems, the validity of putative law depends partly upon authoritativeness of source—on whether the putative law in question was duly adopted by an authorised legislative body or duly laid down by a proper court (and

[21] Many judges in my country, however, are often tempted to flatten out the over- and under-inclusion of formally general rules in light of policy considerations emergent at point of application. Among other things, this increases systemic uncertainty, upsets reliance, and sacrifices other second-level rationales behind formality. This does not mean it should *never* be done.

[22] See Summers, "Theory, Formality and Practical Legal Criticism" (1990) 106 L.Q.R. 407, 422–23.

so on). A source-oriented criterion of validity such as "what the Queen in Parliament enacts is law" does not condition the validity of the putative law in question on its having any particular substantive content. Thus a source-oriented criterion is formal in the sense that source relates to the formal origin of the putative rule, and is itself independent of the substantive content of the rule.

Of course, many modern legal systems also incorporate content-oriented criteria of validity, often in the form of constitutional prohibitions of substantive content, as in the First Amendment to the American Constitution which says "Congress shall make no law . . . abridging freedom of speech". The scope of such prohibitions may be relatively narrow, and in some systems there are no content-oriented criteria applicable to statutes.[23]

It is difficult to imagine how a modern legal system could dispense with validity formality. Most law must come from some source. Furthermore, source-oriented criteria implicate second-level rationales, too—ones to be honoured even when the law so validated is not good law in first-level policy terms. When a statute is formally valid, that is, emanates from the authorised source in a democratic system, this entails due enactment by elected representatives of the people. Legislative autonomy and democratic legitimacy are rationales of high value by any reckoning. But validity formality serves more mundane rationales, too, such as ease of administration and the minimisation of disputes.

C. The Formality of Stare Decisis

Consider now the doctrine of stare decisis. The species of legal formality here defines what is most central to that doctrine, and it, too, is familiar enough. *If* a system is to have common law, then it must require that a precedent be to a considerable extent binding regardless of its substance, that is, be binding independently of the substantive content of the precedent. Plainly, if courts were left free merely to pick and choose which precedents to follow on the basis of substantive content, we would not have stare decisis.[24] Although this variety of formality may also be viewed as a branch of validity formality, it is worthy of distinct treatment in defence of a thesis that law is formal where that law includes a special type of law as important as common law.

[23] Before the European Communities Act 1972, the validity of English statutes was judged solely by formal, source-oriented criteria.

[24] This may seem obvious, but it is not so obvious to a good number of judges in my country. Of course, a system may incorporate corollary doctrines that limit or qualify the principle of stare decisis in various ways that turn on substantive considerations, such as social change combined with unforeseen countervailing substantive considerations emergent at point of application which justify judicial modification.

The formality of stare decisis is backed by familiar and weighty second-level rationales, ones that may clash in particular cases with first-level policies and override them. These rationales include the principle that like cases should be treated alike, itself a formal principle with rational backing of its own.[25]

D. The Formality of the Restricted Power of Judges to Modify Law

A related general body of law and judicial practice in Western systems determines the extent to which courts, at point of application, may *modify* antecedent law in light of unforeseen countervailing substantive considerations newly emergent in the circumstances. This body of law and judicial practice also controls the extent to which courts may modify antecedent law at point of application merely in light of judicial reconsideration of the reconciliation of substantive and formal desiderata embodied in the antecedent law. In Anglo-American systems, this power to modify is greatly restricted in regard to statutes, and when it *is* there exercised, this is not usually done openly but, rather, in the guise of interpretation. In England, this power to modify also remains relatively narrow in regard to binding common law. One may characterise this feature of antecedent law and judicial role as one of high "mandatory formality". This feature is formal in the sense that valid antecedent law ultimately overrides, outweighs or excludes countervailing substantive considerations which would, *de novo*, give rise to rather different law. Formal mandatoriness thus operates independently of the substantive content of the antecedent law, and requires that antecedent law be followed regardless of its substantive content (within limits).

Mandatory formality might be said to be implicit in the validity of statutes and implicit in stare decisis. Yet it is worthy of special emphasis because legal systems just do acknowledge some limited judicial power to modify. The second-level rationales for greatly limiting this power largely overlap with the rationales behind validity formality and stare decisis formality.

E. The Formality of Methods of Interpreting Statutes

The final major variety of legal formality I will now briefly consider inheres in the accepted methodology of statutory interpretation within a system. I distinguish between two methodological polarities which I will label "strict" and "free". Strict interpretation is formal and recognises grounds of decision in the form of interpretive arguments that adhere closely to that meaning, ordinary, technical, or special,

[25] For a general account of the various rationales here, see R.S. Summers, *Instrumentalism and American Legal Theory* (Cornell 1982), pp. 161–66.

expressed in the statutory language.[26] Free interpretation, on the other hand, allows the interpreter to roam beyond the statutory language for grounds of decision rooted in purpose, policy, principle, or equity. These grounds may still be attributable to the statute in the light of extrinsic evidence, or, in America, even in the light of the judge's own political philosophy. Furthermore, where competing grounds of decision emerge, strict interpretation generally accords priority to arguments arising from the ordinary or technical or special meaning of the words of the statute, whereas free interpretation allows the court to "weigh and balance" the conflicting arguments. Strict interpretation is relatively formal, whereas free interpretation is much less so. In my terms, strict interpretation is formal in the sense that it extracts determinative meaning from the authoritative language.

Second-level rationales may justify formal interpretations that are quite contrary to first-level policy. These rationales, too, are familiar. Thus, courts should follow formal interpretive method because this protects citizen reliance on the actual language of published law. Courts should honour directives of the elected legislature as expressed in the words of the statute, which is the only authoritative way in which the legislature can express itself. Courts should adhere to a formal interpretive method because it delimits scope for the substitution of judicial judgment in place of legislative judgment.

The nature of the formality of strict interpretation is not identical with the formality of rules, with source-oriented validity formality, or with the formality of stare decisis. Yet a common link, family resemblance, or filial trace may be discernible here, too. Different authoritative conceptions of statutory content are implicit in the contrast between strict and free interpretive method. Relatively strict interpretation embodies an essentially meaning-oriented concept of statutory content in which informed arguments from ordinary, technical or special meaning determine content (so far as the drafting permits). Free interpretation is much less meaning-oriented and embodies a far wider concept of authoritative statutory content in which essentially substantive considerations of intention, purpose, policy, principle, equity, and the like, may directly inform content in complex, and not so complex, ways. Strict interpretation may be said to be formal in the sense that it extracts meaning from the authoritative language and thus yields interpretations that may be independent of those substantive considerations that inform and define the statutory content pursuant to authoritative free interpretation.[27]

[26] See generally, D. Neil MacCormick and Robert S. Summers, *Interpreting Statutes—A Comparative Study* (Dartmouth Pub. Co. 1991).

[27] It follows that a methodology that approximates rather more closely to strict than to free

I have so far reminded you of the formal character of five major types of legal phenomena. Yet, apart from the point that formal rules must figure in all basic legal phenomena, I have not even been able to suggest how legal procedure is formal,[28] or how the positive theory of legal truth in civil cases is formal[29] or how legal personality is formal,[30] for example. But if the occasion were to permit, I believe I could demonstrate that these and all the other basic types of legal phenomena have a significant formal side.[31] As it is, I must ask you to believe that formality is manifest in all these other types, too, having shown (I contend) that it is manifest in rules and other legal precepts, in source-oriented criteria of validity, in the doctrine of stare decisis, the mandatoriness of antecedent law at point of application, and in strict methods of statutory interpretation. These five plainly qualify as basic types of legal phenomena, and are themselves distinctive and varied.

III. Formality in a Legal System Viewed as a Whole

Actually, my overall thesis that law is formal in character is two-pronged. In my view, it is not only the case that all basic types of legal phenomena within a legal system have significant formal attributes, but also that a legal system *taken as a whole* displays its own significant varieties of formality. Here, I can only suggest the major respects in which a legal system viewed as a whole, in its structure and in its modes of functioning, may be characterised as formal. I will identify these as "systemic" varieties of formality.

A. The Formality of Governmental Structure

It is a commonplace among political theorists that the structure of government within a legal system may be appropriately characterised as formal, in contrast to the governing law created and administered by and through this structure. By structure, I refer mainly to the basic institutions of governance and their relations. Two systems can

---

interpretation is, in a deep sense, more genuinely interpretive, as opposed to reformative or elaborative.

[28] Yet procedural law and the processes it so constitutes are plainly formal not only in the high formality of the precepts out of which processes are constructed but also in the independence of processes from the substantive content of the law interpreted and applied within them. Second-level rationales behind much of this formality are explored (though not so conceptualised) in Summers, "Evaluating and Improving Legal Processes—A Plea for Process Values" (1974) 60 *Cornell Law Review* 1.

[29] Our theory of legal truth is plainly formal to a significant degree. See Summers, "Judge Posner's Jurisprudence" (1991) 89 *Michigan Law Review* 1302, 1312–1313.

[30] Corporate personality is plainly formal in major part. So, too, is the legal personality of most other recognised legal entities, public and private.

[31] The systematic study of each variety of formality requires that we address a range of common questions to each. Just what those questions should be is itself a vital question.

be quite similar in the general content of their governing law, yet display very different formal structures. Within Anglo-American systems, which are broadly similar in the content of much of their law, there are many differences of formal structure. Even so, some basic features of formal structure are, in general contours, widely shared in these systems. Examples are rules providing for judicial review of administrative action, and rules securing judicial independence. Again, strong rationales lie behind most such features of formal governmental structure, and some structural features of governance can be secured only through rules of high preceptual formality.

The very subject-matter of rules establishing governmental structures is formal, in contrast to the content of the law created and administered by and through the system of government. The resulting governmental structures are likewise formal, and thus content-independent. In terms of logical possibilities, a governmental structure could be good, yet the content of the law it creates not be good, and *vice versa*. Of course, formal governmental structure often in fact functions in ways that significantly affect content. Thus, for example, deficiencies of formal structure frequently account for law bad in content or bad as administered, as where a lack of judicial independence sometimes leads elected judges in a country to render decisions that are "politically responsive" yet legally incorrect.

B. Coherence Formality

A complex modern system recognises many different sources of valid law, and the different laws emanating from these sources may come into conflict thereby requiring further legal rules assigning priority. In Anglo-American systems, such rules are generally formal in that they determine priority largely in accord with a ranking of the sources themselves, rather than in accord with the comparative quality of the substantive content of the conflicting laws. For example, in America, constitutional law takes priority over statute, statute over common law, common law over contract and so on. Such formal prioritisation can itself greatly affect content. For example, newly valid law may be bad and thus drive out good law, as where a bad statute displaces good common law (which, some would still say, is frequently the case). Yet formal prioritisation generally secures overall coherence, itself a formal systemic virtue. Again, strong rationales lie behind such a set of priorities, and further distinct rationales lie behind systemic coherence itself.

C. The Formality of Legal Continuity

Another major type of formality attributable to the legal system as a whole is relatively amorphous, and is itself secured in diffuse and varied ways. Numerous devices within a system may operate by design or otherwise to secure general continuity of the law despite some deficiencies in its substantive content. I refer, for example, to formal procedural and other obstacles that must be overcome in a legislative body not only to amend old statutes but to enact new ones. In my own country, these hurdles are especially formidable. There are functionally similar formal features of adjudicative processes, including provision for dismissal of claims not yet recognised in law, as well as various doctrines of standing and ripeness that limit justiciability quite independently of content. Various rationales justify some level of continuity in the law's content, including the avoidance of confusion born of significant legal change, and the facilitation of planning and reliance.[32] The general level of "continuity formality" within a system may greatly affect its content. Of course, this level can be too high, and unduly inhibit change. If some Benthamite should someday invent a calculus that can be deployed appropriately to fine-tune the law's "rules of change" (as Hart called the phenomena here), this individual would certainly take a prominent and permanent place in the annals of law and jurisprudence!

D. Formal Legality

I turn to a further type of systemic formality, one which is, in part, known to lawyers under the rubric of "the rule of law". A Government may govern largely through law publicly laid down in advance, or it may govern largely through *ad hoc*, un-coordinated, non-uniform, and sometimes even retrospective decisions and decrees. Governance by and through law duly promulgated in advance, and applied in conformity with standards of due process, is the essence of what I will call "formal legality". Formal legality as such goes to the manner or mode of governance, as distinguished from the substantive content of the governing law itself. Again, in terms of logical possibilities, a system might have laws quite good in content, yet be highly deficient in formal legality. For example, the system might fail to publish laws adequately, fail to lay them down in advance, and fail to accord procedural due process. Plainly, such deficiencies of legality would adversely affect the overall quality of governance. Formal legality,

[32] Justice Brandeis even said that "in most matters it is more important that the applicable rule of law be settled than that it be settled right". *Burnet, Commissioner of Internal Revenue* v. *Coronado Oil and Gas Co.*, 285 US 393, 405 (1932).

too, is justified by powerful second-level rationales, including procedural fairness.[33]

E. The Formality of the Liberal State

A final variety of systemic formality that I will identify is formal in a rather special way. We may distinguish two polarities. A given legal system may seek only to secure for its citizens the conditions generally required for their own choice and pursuit of substantive ends of life, or a system may itself impose an official vision of the ends of life on its citizens, and deploy the resources of law, including the power to tax, in order to try to secure the actual fulfilment of these official ends of life. The first of these basic approaches is formal in a special content-independent way. It does not prescribe or undertake to confer the substance of any such end-states upon citizens. It merely seeks to secure, through a variety of legal techniques and devices, general conditions such as civic order, basic educational opportunity, openness of occupations, a law of contract and of property, and the like. These conditions in turn facilitate pursuit of such substantive ends as the individual sees fit. Conditions of this nature are formal because they are relatively neutral as between most items in the array of ultimate substantive ends individuals might pursue. We may call this the formality of the liberal state, and it, too, is backed by powerful rationales.

The formal character of law can be seen, then, not only in basic types of legal phenomena such as rules and other precepts, standards and criteria of valid law, the principle of stare decisis, methodologies of statutory interpretation, and the restricted power of the judiciary to modify antecedent law. The formal character of law can also be seen in a legal system viewed as a whole—in the formal structure of its governing institutions, in the formal coherence of its law, in the formal continuity of its legal content over time, in its formal legality (including its adherence to requisites of the rule of law), and also in its liberal commitment to securing merely the formal conditions for individual choice and pursuit of the substantive ends of life.

IV. Formality and Jurisprudence

Now, in this final part, I will provide a very general account of some of the ways in which legal formality is of great interest from a jurisprudential point of view.

[33] That formal mode of functioning whereby affairs are governed by and through law may be further analysed in terms of law's five formal techniques or "law ways". See Summers, "The Technique Element in Law" (1971) 59 *California Law Review* 733. I am also indebted to Lisa Murphy here.

A. Formality as Itself a Characteristic of Law

I hope to have shown that it is a fundamental fact about law that it has a formal character analysable in terms of varieties of formality manifest in basic types of legal phenomena, and if I am right, also analysable in terms of more general and systemic varieties of formality manifest in the legal system viewed as a whole. The analysis of any general characteristic of law should advance jurisprudential understanding. After all, one accepted way to provide a jurisprudential account of the nature of law is to provide a comprehensive account of its necessary and salient characteristics. This is not to say that I have been able to present law's formal character fully here. Much work remains.

B. Formality and the Analysis of Other Basic Characteristics of Law

Law has other basic characteristics besides formality. Is an understanding of formality required for, or does it facilitate the analysis of, any of these other fundamental characteristics? I believe it does, and I will offer a single abbreviated example. One of those other characteristics now virtually staring us in the face is that law has substantive content, too. Indeed, according to Hart, for a legal system to exist at all it must have a minimum substantive content.[34]

We should now be able to see that the substantive nature of law, though itself an obvious and distinct characteristic, cannot be satisfactorily analysed apart from, or in abstraction from, law's formal character. The general relationship between form and substance in the content of legal phenomena, and in the content of a legal system as a whole, is not a bi-polar or dichotomous relationship but one of complementarity. All formal features of law manifest themselves in some way in complementary substantive content. For example, I noted that the formal attribute of definitiveness must show up in complementary substantive content of the rule. The formality of legal validity manifests itself in the complementary content of criteria of validity specifying that valid law must duly derive from an authoritative source. (And other applicable criteria may specify substantive requirements of validity.) The formality of strict interpretive method manifests itself in complementary ordinary, technical or special meanings attributable to the content of particular statutes. The formality manifest in complementary substantive content does not ordinarily exhaust the whole of that content.[35] We saw, however,

[34] H.L.A. Hart, *The Concept of Law* (Oxford 1961), p. 189.

[35] This is true not only in regard to legal precepts such as rules. Indeed, it is all the more true in regard to the varieties of formality in the legal system viewed as a whole. For example, a legal system has rules setting up the institutions of the system itself, and the very substantive content of these constitutive rules comprises complementary substantive content of the system, but this content hardly exhausts the substantive content of the entire system.

that this formality backed by second-level rationales can even override countervailing first-level policy considerations to some extent in the overall content of a rule.

The relation of form to substantive content in law is not merely like the relation of a container to the thing contained. Form also imprints itself on substantive content. Any general analysis of law's substantive character must therefore take account of this imprint. Whole essays wait to be written here on the varied and complex fusions of substance with form, and on the homage that substance must pay to form, in a well designed legal order.

C. Formality and the Essence of Law

Formality, then, is one fundamental characteristic of law to be analysed on its own terms, and we must also take account of it when analysing certain other characteristics of law. Now, what is its relative conceptual importance compared to these other characteristics such as law's substantive character, its obligatory nature, or its coercive element? Does formality approximate the essence of law more closely than other characteristics? I will suggest how the case might be made that formality is certainly one of law's most central characteristics, if not its most central.

First, consider how impoverished our conception of law would be if, for example, we were to leave out of our account of law's nature these basic varieties of legal formality: attributes of formality in rules, source-oriented validity formality, the formality of stare decisis, the formality of interpretive method, the formality of governmental structure, the formal coherence of the law of the system, the formal legality of governance, and the formality of continuity of content. Without these, *law as we know it* would not really be recognisable.

Moreover, I believe it is a fact that today we already tend to characterise much of what is distinctive about any given Western legal system more by reference to its formal features than by reference to its substantive character or, indeed, than by reference to any other basic characteristic. Thus, for example, we characterise in terms of differences in formal structures of government, or in terms of whether a system is a codified system or a common law system, or in terms of differences of interpretive method. If I am right, we can go well beyond this and deploy a much more elaborate apparatus of characterisation in terms of differences in the varieties and levels of all types of formality I am identifying here. Of course, differences of substantive content, for example, may also serve as a criterion of differentiation, but many comparativists hold today that Western systems tend toward similar substantive solutions to the same problems.

Furthermore, formality is a primary and distinctive measure of

the very identity of any particular legal system. One way to test this is to imagine that a number of basic changes in the formality of a given system take place over a discrete period, and then to pose the question whether that system might be said to have lost its very identity and to have taken on a new one. Suppose, for example, that the system is changed from a system of commonly incomplete rules at inception to largely complete ones; that the system is also changed from a system of unclear rules to highly definitive ones; that the system is also changed from one in which the law consists largely of orders issued *ad hoc* to a system in which the law takes the form of relatively general rules; that the system is also changed from one in which law is interpreted and applied rather freely in light of substantive ends and means to one in which law is interpreted and applied strictly in light of informed linguistic arguments closely tracking the authoritative text; that the system is also changed from one in which judges have vast power to modify antecedent law in light of countervailing substantive considerations emergent at point of application to one in which they have only very restricted power to do so. Now, if all this were to occur, we might well doubt whether such a system, so changed in all these significantly formal respects, would still be the *same* legal system. And yet many more formal changes, major in nature, could be imagined.

D. Formality and Normative Jurisprudence

In an era in which jurisprudential theory has already become preoccupied with policy concerns, especially in my country and to an extent here as well, it may not be necessary to stress that the subject has a normative and evaluative branch that extends to law's fundamental characteristics. I have already acknowledged that the formal character of law is not merely a datum of reality to be studied solely in a scientific spirit of positive analysis and description. Formality must also be conceived as a desideratum of law and legal ordering, or rather as various desiderata clustering about basic legal phenomena, and as various systemic desiderata of a legal order as a whole. As we have seen, all formal desiderata are backed by various important values or second-level rationales. Yet formality seems always to be under strain in a system of law, and thus at risk of failing to secure or to retain its rightful place. Much (though far from all) of this strain can be explained in terms of a persistent and frequently latent struggle between what I have called the second-level rationales behind formality and the first-level policies informing the law's content directly and immediately. In the long history of jurisprudence, this deep, wide-ranging, and inevitable struggle has not been fully exposed and understood for what it is. We need close,

continuous and systematic study of the nature of formal desiderata, and of the justified bearing of second-level rationales behind them, not merely in the abstract but also in concrete interaction with first-level policy in many and diverse contexts of actual legal experience.

V. CONCLUSION

The jurisprudential study of formality casts light on still other problems of jurisprudence—ones in which the focus is not on law's fundamental characteristics as such. For example, I believe I can now see how the study of formality opens up a new way to analyse rules and establish their primacy in law, provides a fresh approach to the analysis of legal reasoning, suggests a more effective way to demonstrate the relative autonomy of law as a social phenomenon, promises a fruitful reinterpretation of the rule of law, and yields a better account of the separation of law and morals. If I am right, the subject of formality has the potential to become a major branch of legal and jurisprudential inquiry.